

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

**SHAKIRA NAVARRO-ROSARIO,**

**Plaintiff,**

**v.**

**FEDERICO J. FUXA-CATALAN, et al.,**

**Defendants.**

**Civil No. 09-2253 (GAG)**

**OPINION AND ORDER**

Plaintiff Shakira Navarro-Rosario ("Plaintiff") brought this action seeking redress for alleged discrimination on the basis of sex and pregnancy, pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 29 U.S.C. §§ 2000e *et seq.*, and the Pregnancy Discrimination Act of 1978 ("PDA"), 29 U.S.C. § 2000e-(k). Plaintiff also invokes the supplemental jurisdiction of the court to adjudicate her claims under various Puerto Rico state laws. Plaintiff filed this claim against her employer, FJ Construction Co., Inc. ("FJ"), and her employer's sister company, Escorial Development, Inc. ("Escorial"), as well as Federico Fuxa-Catalan ("Fuxa") and Gloria Perez ("Perez"), as the president and comptroller, respectively, of both companies.<sup>1</sup> The court in a Memorandum Opinion and Order dated May 18th, 2010 (Docket No. 39) dismissed Plaintiff's Title VII and Law 80 claims against Fuxa and Perez in their personal capacities and retained jurisdiction of Plaintiff's state claims against them.<sup>2</sup>

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<sup>1</sup> Also included in the complaint are defendant Fuxa's wife and conjugal partnership. Javier Andreu, vice-president of both companies, was also brought in the complaint, but the claims against him were voluntarily dismissed. (See Docket Nos. 18 & 19.)

<sup>2</sup> Remaining before the court are Plaintiff's Title VII claims against FJ and Escorial Development, as well as the remaining supplemental state law claims against all of the defendants, to wit: the Law 100, Law 80, Law 69 and Law 3 causes of action, as well as Plaintiff's independent

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3 This matter is presently before the court on co-defendants' FJ and Escorial motion for  
4 summary judgment (Docket No. 85-2). Plaintiff timely opposed Defendant's motion for summary  
5 judgment (Docket No. 91). After reviewing the pleadings and pertinent law, the court **DENIES**  
6 Defendants' motion for summary judgment.

7 **I. Standard of Review**

8 Summary judgment is appropriate when "the pleadings, depositions, answers to  
9 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
10 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter  
11 of law." Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "An issue is  
12 genuine if 'it may reasonably be resolved in favor of either party' at trial, and material if it  
13 'possess[es] the capacity to sway the outcome of the litigation under the applicable law.'" Iverson  
14 v. City of Boston, 452 F.3d 94, 98 (1st Cir. 2006) (alteration in original) (citations omitted). The  
15 moving party bears the initial burden of demonstrating the lack of evidence to support the  
16 non-moving party's case. Celotex, 477 U.S. at 325. The nonmoving party must then "set forth  
17 specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). If the court finds  
18 that some genuine factual issue remains, the resolution of which could affect the outcome of the  
19 case, then the court must deny summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S.  
20 242, 248 (1986).

21 When considering a motion for summary judgment, the court must view the evidence in the  
22 light most favorable to the non-moving party and give that party the benefit of any and all reasonable  
23 inferences. Id. at 255. Summary judgment may be appropriate, however, if the non-moving party's  
24 case rests merely upon "conclusory allegations, improbable inferences, and unsupported  
25 speculation." Forestier Fradera v. Municipality of Mayaguez, 440 F.3d 17, 21 (1st Cir. 2006)  
(quoting Benoit v. Technical Mfg. Corp., 331 F.3d 166, 173 (1st Cir. 2003))

26 **II. Factual & Procedural Background**

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28 cause of action under Article II, sections 1, 8 and 16 of the Constitution of the Commonwealth of  
Puerto Rico for violations to her dignity and privacy. (See Docket No. 39.)

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2 Plaintiff began working at FJ, a Puerto Rican construction company, in 2003. She first held  
3 the position of warranty manager. She was appointed estimator of the Company in 2004, and as  
4 purchasing manager in 2005. While working at FJ, Plaintiff had three (3) pregnancies and gave birth  
5 to two (2) children. In December 2008, Plaintiff was terminated from her employment. She alleges  
6 that the reason for termination was her third pregnancy. Defendants contend that Plaintiff was  
7 terminated as a result of the need to reduce its operational costs due to its financial difficulties.

8 In her deposition, Plaintiff testified that she was harassed and discriminated against during  
9 her second and third pregnancies. According to Plaintiff, she was harassed and discriminated against  
10 by her boss, Fuxa, when she informed him that she was pregnant with her second child, and he  
11 allegedly responded: "¿no jodas?"<sup>3</sup> (See Docket No. 100-2 at 58, l. 23-24.) Plaintiff stated at her  
12 deposition that this incident occurred in front of other employees and as a result, she felt humiliated  
13 and embarrassed. (See Docket No. 100-2 at 59, l. 20-24.) Also during her second pregnancy,  
14 Plaintiff felt harassed when Perez, treasurer and comptroller of the company, sent her various  
15 consecutive e-mails questioning her work. (See Docket No. 90-11 at 1-3; Docket No. 100-2 at 48,  
16 l. 17-20; at 49, l. 4-12, 23-25 and at 50, l. 1-3.) These e-mails were sent to her one day prior to the  
17 receipt of her first job performance evaluation and she alleges that they had a negative effect on said  
18 evaluation. The record shows that this was her first job evaluation and that Plaintiff was surprised  
19 by the poor evaluation she received, because her employer had never written or verbally expressed  
20 any kind of negative criticism regarding her work. (See Docket No. 91-30 at 1-8, and Docket No.  
21 100-2 at 64, l. 24-25 and at 65, l. 10-16.)

22 Fuxa's comment together with Perez' constant scrutiny of her work and the negative job  
23 evaluation she received, made her fear that she would be terminated. (See Docket No. 1 at ¶ 4.13.)  
24 As a result, she went to the U.S. Department of Labor to receive an orientation as to her rights and  
25 was informed that the only thing they could do at that point was to make sure that FJ maintained her

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27 <sup>3</sup> "¿No jodas?" in Puerto Rico translates to "you're shitting me?" (translation by certified  
28 court interpreter Janis Palma).

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2 employment during her pregnancy and maternity leave. (See Docket No. 91-22 at ¶ 23.)

3 Defendants contest Plaintiff's allegations of pregnancy discrimination by stating in their  
4 pleadings that when Plaintiff had complications during her second pregnancy, Fuxa tried to  
5 accommodate her needs by offering her a part-time arrangement in which she would be compensated  
6 with her full time salary. The record shows that the part-time arrangement lasted one week.  
7 According to Plaintiff, the arrangement did not last because Fuxa determined that Plaintiff could not  
8 perform her duties adequately under this arrangement. (See Docket No. 90 at ¶ 19.) According to  
9 defendants, the part-time arrangement did not materialize because of Plaintiff's doctor's orders. (See  
10 Docket No. 101 at ¶¶ 17, 18, 19.) There were two additional part-time arrangements agreed upon  
11 by Plaintiff and Defendants. The final one being six hour day shifts with half hour lunch breaks.  
12 Finally, Plaintiff was ordered bed rest because she was having complications with her pregnancy.  
13 (See Docket No. 90 at ¶ 19.)

14 During Plaintiff's second maternity leave, Defendants renewed their medical insurance  
15 contract and issued employees new insurance cards. It is a contested fact whether or not Plaintiff  
16 was timely informed that new cards had been issued, and whether or not she was informed that if  
17 she sent a representative to pick up the cards he would need a written authorization from her. (See  
18 Docket No. 100-3 at ¶ 10.) Plaintiff alleges that when her partner and father of her third child, went  
19 to pick up the new insurance cards, an employee at FJ refused to give him the cards because he didn't  
20 have Plaintiff's written authorization. Even though Plaintiff pleaded over the phone with the FJ's  
21 employee to give her partner the cards, he was told to come back the following week. Her children  
22 were sick with bronchitis and asthma during the weekend and had to go to the emergency room and  
23 since she didn't have insurance coverage she had to pay for the emergency room visit. Plaintiff states  
24 under oath that her second baby was not included in the new insurance contract. (See Docket  
25 No.91-22, at ¶¶ 41, 42, 43.)

26 During 2007, FJ suffered financial difficulties and could not pay its suppliers due to debt  
27 owed to the company from a previous construction project. As a result of FJ's critical financial  
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2 situation, MAPFRE, FJ's surety, did not issue FJ additional insurance bonds and recommended that  
3 its board of directors form a new corporation. Following MAPFRE's advice, Escorial was born and  
4 began operations in 2007. The same year, FJ and Escorial entered into a written service contract  
5 (See Docket No. 100-4.) Under the contract, Escorial paid FJ a monthly fee of thirteen thousand  
6 dollars (\$ 13,000.00) for the use of its facilities, equipment, and/or any other materials including  
7 personnel. The service contract authorized FJ employees to perform all sorts of tasks related to the  
8 construction business. Defendants allege that Plaintiff was never employed by Escorial, that she was  
9 never paid a salary by Escorial, nor did she ever apply for a job at Escorial. Instead, she performed  
10 tasks in accordance with the service contract entered into by both companies.<sup>4</sup> (See Docket No.  
11 100-2 at 28, l. 23-25; at 29 l. 1-3.) Plaintiff counter alleges that she and other employees were never  
12 informed of the existence of the above mentioned service contract. Furthermore, it is Plaintiff's  
13 contention that FJ employees were under the impression that they worked for Escorial as well as for  
14 FJ. In fact, Plaintiff declared at her deposition that seventy percent (70%) of the work she performed  
15 as purchaser was for Escorial. (See Docket No. 100-2 at 29 l. 4-22.)

16 In order to reduce operational costs, FJ had to make adjustments in the work shifts of all  
17 company employees due to the lack of new construction projects. As of October 2008, FJ's current  
18 liabilities exceeded its current assets by \$5,988,889 and its stockholders' deficiency amounted to  
19 \$1,362,999.00. (See Docket No. 100-3 at 25.)

20 It is an uncontested fact that around September 2008, Plaintiff informed Defendants that she  
21 was pregnant with her third child. Plaintiff alleges that in response to the news of her third  
22 pregnancy, Perez commented: "But again, Shakira?" (See Docket No. 100-2 at 56, 2-3). Three  
23 months later, on December 8, 2008, FJ laid-off Plaintiff as well as two other non-pregnant

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26 <sup>4</sup> Plaintiff testified at her deposition that during the years she worked for FJ, her salary was  
27 always paid by FJ. (See Docket No. 100-2 at 26, 10-11.) She also testified that at the end of each  
28 fiscal year FJ provided her with a tax withholding stub for purposes of her tax returns that reflected  
compensation paid to her by FJ. (See Docket No. 100-2 at 26, 17-19.) In addition, FJ paid the  
premiums for her health insurance plan. (See Docket No. 100-2 at 28, 3-16.)

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2 employees, Liza Alvarado and Denise Collado, allegedly as a result of its financial difficulties.  
3 Plaintiff contends that she was terminated as a result of her third pregnancy, because her employer  
4 feared that she would suffer the same complications she went through during her second pregnancy,  
5 which resulted in absences from the workplace.

6 On December 9, 2008, Plaintiff filed an administrative complaint with the Equal  
7 Employment Opportunity Commission ("EEOC") and the Puerto Rico Antidiscrimination Unit  
8 ("ADU") and She also claimed unemployment benefits with the Puerto Rico Department of Labor.  
9 On September 25, 2009, the EEOC issued the Notice of Right to Sue letter. Plaintiff filed the  
10 complaint at bar within the 90 day period after the Notice of Right to Sue was issued. (See Docket  
11 No. 1-2.)

12 **III. Discussion**

13 **A. PDA Claim**

14 Defendants allege that Plaintiff has failed to demonstrate sufficient evidence to create a  
15 material issue of fact with regard to a number of elements of her claim under the PDA.

16 Under Title VII, it is unlawful for an employer to discharge or otherwise discriminate against  
17 any individual on the basis of "race, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).  
18 The Pregnancy Discrimination Act of 1978 added pregnancy, childbirth, and related medical  
19 conditions as conditions constituting a protected class for purposes of sex discrimination under Title  
20 VII. See Gonzalez v. Biovail, 356 F. Supp. 2d 68, 78 (D.P.R. 2005). Title VII claims, in which a  
21 plaintiff is unable to demonstrate direct evidence of discrimination, follow the McDonnell Douglas  
22 burden shifting analysis. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993);  
23 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a pregnancy discrimination  
24 claim under Title VII, a plaintiff must demonstrate: 1) that she is a member of a protected class; 2)  
25 that she was qualified for the position and performed her job satisfactorily; 3) that her employer took  
26 an adverse employment action against her; and 4) that the employer had a continuing need for the  
27 services that plaintiff had been rendering. See Hernández-Mejías v. General Elec., 428 F. Supp. 2d  
28 4 (D.P.R. 2005); Gorski v. New Hampshire Dept. Of Corrections, 290 F.3d 466, 474-75 (1st Cir.,

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2 2002). After establishing the *prima facie* case, the burden of production shifts to the employer to  
3 provide a legitimate nondiscriminatory reason for the adverse employment decision. See Hicks, 509  
4 U.S. at 506-07. If the employer does so, the burden of production then returns to the plaintiff, who  
5 must make a showing that the defendant's explanation was merely pretext and that the real reason  
6 for the adverse action was discrimination based on her pregnancy. See Thomas v. Eastman Kodak  
7 Co., 183 F.3d 38, 56 (1st Cir.1999).

8 In their motion for summary judgment, Defendants aver that Plaintiff has failed to establish  
9 a *prima facie* case of pregnancy discrimination. Furthermore, Defendants allege that FJ had  
10 legitimate nondiscriminatory reasons for terminating the Plaintiff and that there is no evidence that  
11 other similarly situated employees outside of her protected class were treated more favorably.

12 **1. Prima Facie Case**

13 **a. Membership in a Protected Class**

14 Plaintiff clearly demonstrates that she was part of a protected class. In their statement of  
15 uncontested material facts Defendants state that Plaintiff notified them that she was pregnant with  
16 her third child around September 2008. (See Docket No. 101 at ¶ 46.) Plaintiff demonstrates the  
17 first prong of a *prima facie* case of sex discrimination.

18 **b. Qualified for the Position and Performed Her Job**  
19 **Satisfactorily**

20 Plaintiff demonstrates that she was qualified for the positions of warranty manager, estimator  
21 and purchasing manager of the Company. In their statement of uncontested material facts  
22 Defendants state that Plaintiff held the above mentioned positions. (See Docket No. 101 at 6, 8, 15.)  
23 The following are uncontested facts: In November 2003, Plaintiff was hired as a supervisor of the  
24 Warranties Department. (See Docket No. 90-7 at 23.) In this position she had several employees  
25 under her supervision. In May 2004, during her first pregnancy, Plaintiff was appointed estimator  
26 by Defendants. In order for her to perform the newly assigned duties related to price quotes for new  
27 construction projects, Fuxa had Plaintiff take three courses related to the examination and  
28 understanding of blueprints. To attend one of these courses Plaintiff had to fly to the state of Florida



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2 accompanied by Fuxa. At this point she was 6 months pregnant with her first child. In January,  
3 2005 Plaintiff was appointed as purchase manager of FJ. In this position she was in charge of calling  
4 FJ's suppliers to inquire about the prices of equipment and construction materials. In the different  
5 positions that she held, Plaintiff consistently received salary raises, as did other employees. (See  
6 Docket No. 91-1 at 46, 47, 48, 51, 52.)

7 There is no issue of fact regarding Plaintiff's qualification for the job or her performance.  
8 Plaintiff demonstrates the second prong of a *prima facie* case of sex discrimination.

9 **c. Adverse Employment Action**

10 It is an uncontested fact that Plaintiff was terminated from her employment on December 8,  
11 2008, while she was pregnant with her third child. Plaintiff demonstrates the third prong of a *prima*  
12 *facie* case of sex discrimination.

13 **d. Inference of Unlawful Discrimination**

14 Defendants aver that Plaintiff has failed to present direct evidence demonstrating the last  
15 prong of a *prima facie* case of pregnancy discrimination; an inference of unlawful discrimination.  
16 According to First Circuit case law, a complainant may satisfy this fourth prong by showing "that  
17 the employer had a continued need for 'someone to perform the same work after [the complainant]  
18 left.'" Alvarez Cabrera v. Trataros Const. Inc., 184 F. Supp. 2d 149, 152 (D.P.R. 2002) (quoting  
19 Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 155 (1st Cir. 1990)).

20 Plaintiff alleges that she acted as purchase manager for both FJ and Escorial. Specifically,  
21 she alleges that between 2007 and 2008, 70% of the work she performed was for Escorial. (See  
22 Docket No. 100-2 at 29, l. 4-22 and at 94 l. 4-6.) Plaintiff claims that when she was terminated from  
23 her job, employee Liza Meléndez, who was not pregnant, continued performing her duties as  
24 purchase manager for Escorial. (See Docket No. 100-2 at 94 l. 12-19 and at 95 l. 14-15.) Plaintiff  
25 argues that FJ and Escorial acted as the same company, they acted as a single employer; therefore,  
26 the fact that Liza Meléndez was performing as purchase manager for Escorial proves that defendants  
27 had a continuing need for the duties Plaintiff performed.

28 Defendants counter-allege that FJ and Escorial are separate entities that have separate



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2 accounting departments, separate corporate structures and file their corporate documents  
3 individually. (See Docket No. 101 at 75.) They argue that the work that plaintiff performed for  
4 Escorial was as a result of the existing service contract between FJ and Escorial. Defendants allege  
5 that after Plaintiff was dismissed they terminated the position of purchase manager at FJ. They  
6 contend that FJ did not have any new projects and was performing warranty work for completed  
7 projects. Therefore, the minimal purchases required were handled by the corporation's shareholders.  
8 (See Docket No. 101 at ¶¶63, 64.)

9 Plaintiff argues that purchases for Escorial and FJ were not handled by its shareholders, but  
10 instead they were handled by Plaintiff, and by Liza Mélenéz after Plaintiff was terminated.  
11 Furthermore, Plaintiff alleges that Fuxa, acknowledged in his deposition that Liza Meléndez acted  
12 as purchaser for Escorial. (See Docket No. 90-26 at 41, l. 14-17.) Plaintiff provides two sworn  
13 statements, one from an FJ supplier and one from an FJ and Escorial chauffeur, that was under  
14 Plaintiff's supervision. They both declare that Liza Meléndez continued to perform Plaintiff's duties  
15 as purchase manager once she was laid off. (See Docket No. 91-48 at ¶¶ 1-2.)

16 With respect to the fourth prong of the *prima facie* case of sex discrimination, Plaintiff raises  
17 an issue of material fact. Therefore, the court must submit to the jury the question of whether or not  
18 FJ and Escorial continued to employ someone in Plaintiff's position following her termination.

19 As there is a contested issue of fact with regards to this fourth and final element, the court  
20 **DENIES** summary judgment at this stage.

21 **2. Legitimate Non-Discriminatory Reason for Termination**

22 Defendants contend that even if Plaintiff has sufficiently pled a *prima facie* case of  
23 pregnancy discrimination, her claim still fails under the second step of the McDonnell Douglas  
24 burden shifting analysis. Once a plaintiff has established their *prima facie* case, the burden of  
25 production shifts to the employer to proffer a legitimate non-discriminatory reason for the  
26 employee's discharge. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). In meeting this  
27 burden, Defendants have proffered, as the reason for Plaintiff's discharge, that she was terminated  
28 together with two other non-pregnant employees as a result of FJ's financial difficulties. Defendants

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contend that Plaintiff's termination was a business decision and was not based on her pregnancy. (See Docket No. 101 at 53, 56, 57.)

Plaintiff does not contest that FJ was struggling financially. Instead, she alleges that Escorial was created as an alter ego of FJ so it could continue bidding on new projects and participating in new developments because FJ was unable to acquire new projects or obtain financial credit as a result of its dire financial situation. (See Docket No. 91 at 20.) Plaintiff further contends that Escorial was created as a result of FJ's inability to pay its suppliers, obtain credit, or cover its costs. As an alter ego of FJ, Escorial employed all of FJ's employees with the exception of the Plaintiff, and two other non-pregnant employees.

The jury will ultimately decide whether Escorial was created as an alter ego of FJ and whether both corporations acted as a single employer for purposes of Title VII liability. However, for purposes of this motion, the court will assume that Defendants have met their burden of production and will therefore move onto the final step of the McDonnell Douglas analysis: whether Plaintiff has provided evidence that would allow the jury to infer that Defendants' proffered reason for the discharge was pretextual. See Thomas v. Eastman Kodak Co., 183 F.3d 38, 56 (1st Cir. 1999).

### 3. Pretext

The First Circuit has warned that where a plaintiff in a discrimination case makes out a *prima facie* case and the issue becomes whether the employer's stated nondiscriminatory reason is a pretext for discrimination, courts must be "particularly cautious" about granting the employer's motion for summary judgment. See Hodgens v. General Dynamics Corp., 144 F.3d 151, 167 (1st Cir. 1998) (quoting Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 928 (1st Cir. 1983)). However, this caution does not preclude the court from granting summary judgment on the issue of intent. See id. "If the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation, summary judgment may be appropriate even where intent is an issue." Id. (quoting Smith v. Stratus Computer, Inc., 40 F.3d 11, 12 (1st Cir. 1994)). Where, however, the nonmoving party has produced more than that, trial courts "should 'use restraint in

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granting summary judgment' where discriminatory animus is in issue." DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) (quoting Velazquez v. Chardón, 736 F.2d 831, 833, (1st Cir. 1984)); see Stepanischen, 722 F.2d at 928. The role of the trial judge at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); see Hodgens v. General Dynamics Corp., 144 F.3d 151, 167 (1st Cir. 1998). Conclusory statements must be supported by factual allegations in order for the court to find that a genuine issue of material fact exists. See Velazquez, 736 F.2d 834.

In the case at bar, Plaintiff bears the ultimate burden of establishing that her employer's stated reason for her dismissal was a pretext for discriminatory animus. "An employee can establish pretext 'by showing weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons such that a factfinder could infer that the employer did not act for the asserted non-discriminatory reasons.'" Carreras v. Sajo, Garcia & Partners, 596 F.3d 25, 37 (1st Cir. 2010) (quoting Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 56 (1st Cir. 2000). "Evidence that the employer's stated reasons are pretextual can be sufficient for a jury to infer discriminatory animus." Che v. Massachusetts Bay Transp. Authority, 342 F.3d 31, 39 (1st Cir. 2003). A plaintiff can also demonstrate pretext by showing that decisionmakers, or those in a position to influence decision makers, made discriminatory comments. See Santiago-Ramos, 217 F.3d at 56.

Plaintiff attempts to demonstrate pretext by providing evidence that Fuxa, her boss and supervisor, and Perez, treasurer and comptroller, made discriminatory comments during her second and third pregnancies. For example, when she informed Fuxa that she was pregnant with her second child, he allegedly responded: "¿no jodas?" ("you're shitting me?") (See Docket No. 100-2 at 58, 23-24.) Another instance in which Plaintiff alleged she felt discriminated against was when Plaintiff informed Perez of her third pregnancy, and she allegedly commented: "But again, Shakira?" (See Docket No. 100-2 at 56, 2-3.) Plaintiff also alleges that during her second pregnancy she was harshly scrutinized by Perez. As an example of this scrutiny, she proffers that she was forced to call

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2 Perez every day at six thirty in the morning when she arrived at work. Also during her second  
3 pregnancy, Plaintiff felt harassed when Perez, sent her various consecutive e-mails. Specifically,  
4 the messages dealt with the subject of the trucks under her supervision being left on, while the  
5 drivers dispatched construction materials, and the tracking of the truck drivers' location. (See  
6 Docket No. 100-2 at 49, l. 4-7.) These e-mails were sent to her one day prior to the receipt of her  
7 first job performance evaluation and she alleges that they had a negative effect on said evaluation.  
8 The record shows that this was her first job evaluation and that Plaintiff was surprised by the poor  
9 evaluation she received, because her employer had never written or verbally expressed any kind of  
10 negative criticism regarding her work. (See Docket No. 100-2 at 64 l. 24-25 and l. 10-16.) See  
11 *supra* section II at 4 l. 13-24.

12 Furthermore, in asserting that Defendants' stated reason for discharge was merely a pretext  
13 for discriminatory intent Plaintiff alleges that Escorial was created as an alter-ego of FJ to continue  
14 with FJ's business, since FJ did not have credit to buy supplies and could not get new projects. (See  
15 Docket No. 91 at 22.) Plaintiff alleges that after she was terminated from FJ, together with Liza  
16 Alvarado and Denisse Collado, the remaining employees at FJ were absorbed by Escorial. In order  
17 to prove this assertion, Plaintiff submits as evidence Escorial's and FJ's employees list. (See Docket  
18 No. 90-4 and 90-21) These lists evince that between the years 2007 and 2009 FJ's remaining  
19 employees were transferred to Escorial. Plaintiff claims that even though she was qualified for the  
20 job, was the employee with the most years of experience, and there was a need for the position of  
21 purchaser, she was not hired by Escorial; because she was pregnant.

22 In addition, Plaintiff contends that Liza Alvarado and Denisse Collado, both non-pregnant  
23 employees who were terminated together with Plaintiff, cannot be situated in the same situation as  
24 her. On the one hand, she argues that Alvarado did not possess Plaintiff's qualifications and she had  
25 only worked for a little over a year at FJ; therefore she admits that her dismissal was appropriate  
26 considering FJ's critical financial situation. On the other hand, Plaintiff argues that the fact that  
27 Defendants state that Denisse Collado was laid off from FJ, instead of from Escorial, is an  
28 inconsistency that proves the intermingling and interrelation between both corporations. Plaintiff

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2 alleges that Defendants stated that when Escorial began operations they initially hired two  
3 employees, Collado and Liza Meléndez, but they declare that Collado was laid off together with  
4 Plaintiff and Alvarado, from FJ. (See Docket Nos. 91 at 13 and 85-2 at 5.) Plaintiff argues that  
5 Defendants asserted reason for her termination was pretextual since the real reason for her  
6 termination was "an act of discrimination because of her various pregnancies." (See Docket No. 91  
7 at 13.)

8 In considering all the evidence presented by Plaintiff, the court finds that a reasonable jury  
9 could infer that FJ acted with discriminatory intent when discharging Plaintiff from her position as  
10 purchase manager. Because a reasonable jury could credit the testimony of Plaintiff over that of her  
11 employer, they could also infer that Defendants' stated reason for her discharge was pretextual and  
12 used to obscure underlying discriminatory intent. While such a finding is not necessarily imputed  
13 by the evidence, it is not unreasonable to think that such a conclusion could be reached when  
14 considering the evidence presented by both parties. As previously stated, this task is prescribed to  
15 the jury and not the judge. Therefore, the court **DENIES** Defendants' motion for summary judgment  
16 as to Plaintiff's claim of pregnancy discrimination under Title VII.

17 **B. Plaintiff's Claims against Escorial**

18 Plaintiff claims that Escorial should be held jointly liable with FJ as an alter-ego of FJ.  
19 Plaintiff alleges FJ used Escorial as an alter-ego to "carry on its business because the financial  
20 situation they were in, would not let them acquire new projects or financial credit." (See Docket No.  
21 91 at 20.) Plaintiff claims that the corporate veil between the corporations should be pierced and  
22 as a result both companies should be treated as a single employer.<sup>5</sup>

23 This court has held that "[a] plaintiff who asks a court to disregard independent corporate  
24 structures by piercing a subsidiary's 'corporate veil' faces a high burden of proof." Velazquez v.

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27 <sup>5</sup> Plaintiff establishes that in his deposition, Fuxa admitted that Escorial was created to  
28 continue with FJ's business. (See Docket no. 90-18 at 37, l.13-18.) Allegedly, his declaration is  
another admission of the inter-mingling and operational connection between FJ and Escorial.

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2 P.D.I. Enterprises, Inc., 141 F. Supp. 2d 189 at 193 (D.P.R. 1999). As stated by the First Circuit,  
3 "[c]orporations which simply try to limit their overall liability by establishing, or acquiring,  
4 separately incorporated subsidiaries do not thereby transgress legal or ethical norms. In our  
5 commercially sophisticated society, limited liability is often a paramount consideration in the  
6 decision to maintain corporate separateness, and properly so." United Elec., Radio and Mach.  
7 Workers of America v. 163 Pleasant St. Corp., 960 F.2d 1080, 1093 (1st Cir. 1992).

8 A plaintiff may pierce the corporate veil of a corporation "by [presenting] strong and robust  
9 evidence showing the parent to have that degree of control over the subsidiary as to render the latter  
10 a mere shell for the former." See Escude-Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 905  
11 (1st Cir. 1980) (internal quotations omitted). "To determine whether separate corporations constitute  
12 a single employer, the First Circuit has applied the four factors set out in Radio & Television  
13 Broadcast Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam): (1)  
14 interrelation of operations, (2) common management, (3) centralized control of labor relations, and  
15 (4) common ownership." Milan v. Centennial Communications Corp., 500 F. Supp. 2d 14, 27  
16 (D.P.R. 2007) (citing Penntech Papers, Inc. v. N.L.R.B., 706 F.2d 18, 25 (1st Cir. 1983)). No one  
17 of these factors is controlling, nor do they all need to be present. Id.

18 This court has recognized that as this determination requires an extremely fact-sensitive  
19 analysis, it is a question best suited for a jury. See Crane v. Green & Freedman Baking Co., Inc., 134  
20 F.3d 17, 22 (1st Cir. 1998); Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d  
21 131, 137 (2d Cir. 1991); see also FMC Finance Corp. v. Murphree, 632 F.2d 413, 421 n.5 (5th Cir.  
22 1980) (holding that, as a matter of federal procedure in diversity cases, the issue of corporate entity  
23 disregard is one for the jury).

24 Plaintiff alleges that FJ was suffering financial difficulties and could not pay their suppliers  
25 due to debt owed to the company from a previous construction project. In order to remedy this  
26 situation, FJ's Board of Directors decided to create and operate a sister company under the name of  
27 Escorial. Escorial took on all new projects that were previously planned to be performed by FJ.  
28 Escorial operated from the same building as FJ and both of their Boards of Directors were comprised

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2 of the same members, who occupied the same positions on each board. Fuxa as president, Andreu  
3 as vice president and Perez as treasurer, comptroller and secretary. Both companies share phone  
4 numbers, office equipment and supplies. Finally, Escorial used the same personnel employed by FJ  
5 to perform its duties and projects, without ever formally hiring them. (See Docket No. 91 at 19-20.)

6 Plaintiff has created a material issue of fact with regard to the issue of Escorial's liability as  
7 an alter ego. The court **DENIES** defendant FJ's motion for summary judgment as to this issue.

8 **C. Claims Arising Under Puerto Rico Laws**

9 Defendants also seek summary judgment as to Plaintiff's supplemental claims pursuant to  
10 Puerto Rico Law 100, Law 80, Law 69 and Law 3. Plaintiff's local claims arise out of the same  
11 nucleus of facts that give rise to her federal claims. Plaintiff claims a violation of the Maternity  
12 Leave Act ("Law 3"), P.R. Laws Ann. tit. 29, §469; Puerto Rico's Wrongful Dismissal Act ("Law  
13 80"), P.R. Laws Ann. tit. 29, §185; Puerto Rico Employment Discrimination Law ("Law 100"), P.R.  
14 Laws Ann. tit. 29, §146; and Puerto Rico's Sex Discrimination Statute ("Law 69"), P.R. Laws Ann.  
15 tit. 29 §§1321 *et seq.* These local statutes prohibit discrimination, among other factors, on the basis  
16 of sex and also require that an employer show that termination was based on a valid  
17 nondiscriminatory reason. "Law 100 does not provide a definition of "just cause" therefore Puerto  
18 Rico Courts have adopted the guidelines for justifiable dismissals found in Law 80." (Mejías  
19 Miranda v. BBII Acquisition Corp., 120 F. Supp. 2d 157, 174 n.14 (D.P.R 2000).

20 Courts have recognized that Title VII sex discrimination claims and claims under the PDA  
21 brought under Puerto Rico Law 100, Law 69 and Law 3 are analyzed analogously. See Godoy v.  
22 Maplehurst Bakeries, Inc., 747 F. Supp. 2d 298, 317 (D.P.R. 2010). The court has held above that  
23 a genuine issue of fact exists as to Plaintiff's claim for pregnancy discrimination. Therefore, the court  
24 holds likewise, summary judgment is inappropriate as to the alleged violations of Puerto Rico Law  
25 Nos. 100, 3, 69 and 80. Defendants' motion for summary judgment as to these issues is hereby  
26 **DENIED.**

27 **1. Statute of Limitations Under Law 100**

28 Defendants allege that Plaintiff's Law 100 claim is time barred. They claim that since



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Plaintiff's EEOC charge did not contain any allegations under Law 100, it did not interrupt Law 100's statute of limitations. This allegation is without merit.

The Supreme Court of Puerto Rico has consistently "held that the filing of an administrative complaint before the Equal Employment Opportunity Commission alleging sex discrimination in violation of Title VII toll[s] the statute of limitations for an equivalent cause of action under Puerto Rico law." Rodriguez-Garcia v. Municipality of Caguas, 354 F.3d 91 at 99 (1st Cir. 2004) (citing Matos Molero v. Roche Products, Inc., 132 D.P.R. 470 (1993)); See Leon-Nogueras v. Univ. of P.R., 964 F. Supp. 585, 589 (D.P.R. 1997) ("[The] filing of a Title VII claim with the EEOC not only tolls but suspends the running of the statute of limitations for claims under Law 100 arising out of the same incidents." Consequently, this court held that "by filing an administrative complaint either with the EEOC or with the Anti-Discrimination Unit of the Department of Labor, and notifying such charge to the defendants, a plaintiff can toll the running of the statute of limitations for any claims under Title VII and Law 100." Leon-Nogueras 964 F.Supp. at 588.

With regards to the specificity of the administrative complaint, the First Circuit has clearly established that "[a]n administrative charge is not a blueprint for the litigation to follow." Powers v. Grinnell Corp., 915 F.2d 34, 37 (1st Cir. 1990) (citations omitted). "The charge is not to be treated as a common-law pleading that strictly cabins the investigation that results therefrom, or the reasonable cause determination that may be rested on that investigation." Id. (citations omitted) (internal quotations marks omitted). "The charge merely provides the EEOC with a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices." Id. (citations omitted) (internal quotations marks omitted). The purpose of the charge is to initiate an EEOC investigation, not to state sufficient facts to make out a *prima facie* case. Id. (quoting Sanchez v. Standard Brands, Inc., 431 F.2d 455, 465 (5th Cir. 1970)). Therefore, "the exact wording of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow." Powers, 915 F.2d at 39 (internal quotation marks omitted) (citations omitted). "Rather, the critical question is whether the claims set forth in the civil complaint come within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of

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discrimination.” Id. (citations omitted) (internal quotation marks omitted).

The record shows that Plaintiff filed an administrative complaint with the EEOC alleging sex discrimination due to pregnancy by employers FJ and Escorial on December 9, 2008, the day after she was terminated. (See Docket No. 90-15.) Law 100 is the local statute that protects employees from different types of employment discrimination, including sexual discrimination. Therefore, Law 100 clearly falls under the scope of Plaintiff’s EEOC complaint. According to local and federal case law, the filing of the charge of discrimination with the EEOC interrupts the one year limitations period for Law 100. Therefore, the claim under Law 100 is not time-barred. Accordingly, the court **DENIES** Defendants’ motion for summary judgment on Plaintiff’s Law 100 claim under Puerto Rico law.

**D . Claims Under the Commonwealth's Constitution**

In the complaint, Plaintiff also alleges a violation of her constitutional right to privacy, dignity, and a workplace free of risk and harm to one’s personal integrity, pursuant to the Constitution of the Commonwealth of Puerto Rico, Article II, §§ 1, 8, and 16. In their motion for summary judgment, Defendants contend that the complaint was the first notice they received regarding Plaintiff’s constitutional claims and therefore, the discrimination charge filed by Plaintiff with the EEOC does not toll the one year statute of limitations regarding such claims. As a result, Defendants aver that Plaintiff’s constitutional claims are time-barred and must be dismissed.

Following the analysis set forth in Section C, 1. of this opinion, since Article II of the Constitution prohibits sexual discrimination, it falls within the scope of the administrative complaint filed by Plaintiff with the EEOC.<sup>6</sup> Therefore, the one year statute of limitations was interrupted with

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<sup>6</sup> Article II § 1 of the Constitution of the Commonwealth of Puerto Rico reads as follows:

The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.

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the filing of the administrative complaint. As a result, Plaintiff's claims under Article II §§ 1, 8, and 16 of the Constitution of the Commonwealth of Puerto Rico are not time-barred. Accordingly, the court **DENIES** Defendants' motion for summary judgment on Plaintiff's constitutional claims.

**IV. CONCLUSION**

Defendants motion for summary judgment is hereby **DENIED**. The causes of action brought by Plaintiff for discrimination on the basis of sex and pregnancy pursuant to Title VII and the PDA, remain before the court to be adjudicated by a jury. Defendants' request to dismiss the local claims under Law 100, Law 3, Law 69, Law 80 and Article II, sections 1, 8 and 16 of the Constitution of the Commonwealth of Puerto Rico are hereby **DENIED**.

**SO ORDERED**

In San Juan, Puerto Rico this 11th day of July, 2011.

*S/Gustavo A. Gelpí*

GUSTAVO A. GELPÍ

United States District Judge